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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

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37 pp

(DEATH PENALTY CASE)

QUESTIONS PRESENTED

1. Does the creation of an exception which allows piecemeal review in the federal courts of the guilt phase of respondent's capital trial while an automatic appeal of his penalty phase retrial is still before the State Supreme Court violate the well-established rules of comity and abstention which previously have precluded federal intervention in state criminal cases before those proceedings have been completed?

2. Can a federal circuit court make valid findings of either "extraordinary delay" or "exceptional circumstances of particular urgency" to reject the rules of comity and abstention in a state capital case without first considering a comprehensive record of the proceedings before the state courts and in the absence of any factual record supporting these findings?

3. Can a finding of "extraordinary delay" to permit federal court intervention into a state capital case in which the penalty phase retrial is presently before the State Supreme Court be based solely on the fact that 15 years had elapsed before the defendant's sentence had finally been resolved when a majority of time spent on the case was the result of the defendant's own dilatory tactics?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 95 -

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit reversing the order of the United States District Court for the Eastern District of California dismissing without prejudice respondent's petition for writ of habeas corpus challenging his guilt trial on the grounds (1) of abstention, and (2) failure to exhaust state remedies since the automatic appeal of the penalty phase retrial was already pending in the California Supreme Court.

OPINIONS BELOW

In a case which had been pending before the Ninth Circuit for more than three years, the Ninth Circuit on May 26, 1995, issued an opinion reversing the dismissal order of the United States District Court for the Eastern District of California and reinstating respondent's petition for writ of habeas corpus challenging his guilt trial in that District Court, on the grounds of the extraordinary delay respondent faced if

forced to wait until the automatic appeal of his penalty phase retrial is resolved in the state courts before being able to challenge the guilt trial in the federal courts. The Ninth Circuit held that respondent "should not be required to wait more than fifteen years for his sentence to be finally resolved before he may challenge the constitutionality of his conviction." *Phillips v. Vasquez*, 56 F.3d 1030; Appendix A.

STATEMENT OF JURISDICTION

This Court has jurisdiction under sections 1651, subdivision (a), and 2254, of Title 28 of the United States Code and Rule 20.1 of the United States Supreme Court Rules.

CONSTITUTIONS, STATUTES OR REGULATIONS

28 United States Code section 2254.

STATEMENT OF THE CASE

A. Facts of the Crime

On December 7, 1977, respondent lured building contractors Rose and Bartulis to a remote area in Madera County, ostensibly to purchase stolen insulation. There, respondent shot the two men, took their wallets, poured gasoline over them, and set them on fire with matches he had borrowed from them earlier. When Rose fled, on fire, respondent ran over him and drove off. Rose lived but Bartulis did not. Respondent

was arrested in Utah on March 17, 1978, and, while awaiting extradition, he mailed out a hit list with detailed instructions to kill Rose, respondent's witness-girlfriend, respondent's best friend, and respondent's own mother who could blow his putative alibi. *People v. Phillips*, 41 Cal.3d 29, 39-42, 75-77, 222 Cal.Rptr. 127, 711 P.2d 423 (1985).

B. Procedural Background[1/]

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1. Because of the unique procedural history of this case, the Ninth Circuit issued its novel opinion without an accurate presentation of the factual record. Thus, the opinion in this case is neither supported by any facts nor is it reflective of the actual facts. As will be shown *infra*, before respondent's automatic appeal from his penalty retrial could be ruled on by the California Supreme Court, respondent filed a habeas corpus petition in the District Court, raising only guilt phase issues. The court denied the petition before petitioner could even respond and lodge copies of the relevant record. The Ninth Circuit, after granting a certificate of probable cause to appeal, initially questioned whether it had jurisdiction to proceed and asked for briefing on the issue. When no briefing was forthcoming, the Ninth Circuit issued an order to show cause and had both parties answer three questions, none of which addressed the issue of delay. After the issuance of the Ninth Circuit's opinion reversing the district court's denial of the habeas corpus petition, petitioner sought rehearing. This was the first instance which petitioner had to brief the issue of delay. Petitioner also attempted to lodge with the Ninth Circuit the relevant documents to show what actually took place procedurally between respondent's first capital trial and

1. **Direct Appeal**

A jury convicted respondent of the 1977 murder of Bartulis during the course of robbery and sentenced him to death. *People v. Phillips*, *supra*, 41 Cal.3d 29. Appeal to the California Supreme Court is automatic. *Id.* at 38. Date of sentence was February 20, 1980. After the case was briefed on appeal and orally argued on October 4, 1982, the California Supreme Court on February 23, 1984, requested supplemental briefing, which formed the basis for the December 31, 1985,

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his penalty retrial. Apparently uninterested in the actual facts dealing with the procedural history of this complex case, the Motion to Lodge Documents was denied, and the petition for rehearing was denied. Petitioner is filing an accompanying motion for judicial notice and to lodge those same documents with this Court; they are too voluminous to utilize making them part of the appendix. If this Court grants certiorari and petitioner's motion to lodge, in any brief on the merits, the lodged documents will be referred to by their respective item numbers under the Notice of Lodging (N.L.), with the exception that Items 1-7, the seven volume Clerk's Transcript from the penalty retrial, which will be referred to as "CT" and the appropriate sequential page number. Also, Item 11, a draft of the Statement of the Case at respondent's penalty retrial, has been expanded to include a draft of the Statement of Facts from that retrial. An additional item, Item 16, shows the latest developments in the trial record certification process. Petitioner will refer to the expanded Item 11 to show respondent has not been prejudiced by the delay and that he is in fact responsible for much of the delay.

penalty reversal. Appendix V at 4-6; *People v. Phillips*, *supra*, 41 Cal.3d at 84.

2. **Penalty Retrial**

The hearing on the remittitur was on March 7, 1986. It is important to note that it is Respondent Phillips who personally waived time for his penalty phase retrial rather than requesting a speedy retrial. Thereafter, respondent -- who eventually achieved co-counsel status -- filed a series of motions, including several state habeas corpus petitions, that repeatedly delayed the originally scheduled October 27, 1986, retrial. The actual retrial did not commence until September 23, 1991, and respondent was again sentenced to death on March 13, 1992. Appendix U at 3-26; Appendix V at 6-13. Appeal to the California Supreme Court is again automatic. *People v. Phillips*, *supra*, 41 Cal.3d at 38.

3. **Second Direct Appeal**

Counsel for respondent on direct appeal, Donald J. Horvath -- who is also advisory counsel to respondent in the instant Ninth Circuit proceedings at issue -- had received at least 10 extensions of time to seek corrections to the record of the second penalty trial. This was because respondent had done something unique; he tape recorded his entire penalty retrial and appellate counsel had the time consuming task of comparing the tapes with the typed transcripts.[2/]

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2. Thereafter the state had to await copies of the tapes as furnished by counsel Horvath and then check the suggested record corrections with the tapes and the

Appendix F; Appendix Q at 2-4; Appendix U at 28-30; Appendix V at 17-18.

4. State Habeas Corpus

According to respondent's habeas corpus petition filed in the United States District Court for the Eastern District (Appendix M),[3] respondent filed some six habeas corpus petitions and one habeas corpus appeal in the state courts between April 1988 and September 1991. There were at least two evidentiary hearings and one full blown appellate court briefing. All petitions and the one appeal were denied. Appendix M at 3 - 19; Appendix V at 13-14.

5. Federal Habeas Corpus

On March 4, 1992, respondent filed a petition for writ of habeas corpus in the Federal District Court for the Eastern District pursuant to 28 U.S.C. § 2254. Appendix N at 2.[4] On March 12, 1992, the petition was denied without prejudice, the court noting that

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transcripts, and had not yet completed this task when the Petition for Rehearing and Suggestion for Rehearing en Banc was filed in the Ninth Circuit. Appendix V at 17-18.

3. Because the actual claims on federal habeas corpus are irrelevant to this petition, petitioner includes the petition as Appendix M, but not the accompanying Brief in Support of Petition for Writ of Habeas Corpus.

4. This is the District Court docket sheet for respondent's habeas corpus case.

respondent was not to be sentenced until March 13, 1992. The court declined to interfere with ongoing state criminal proceedings on abstention grounds and further found respondent had failed to exhaust in the state's highest court. Appendix B at 2-4; Appendix N at 2. On May 14, 1992, the District Court denied respondent's request for a certificate of probable cause to appeal. Appendix C. On June 18, 1992, the Ninth Circuit granted respondent's request for a certificate of probable cause. Appendix D. On August 26, 1992, the Ninth Circuit set briefing schedule. Appendix E. On October 1, 1992, attorney Donald Horvath was appointed as advisory counsel to respondent and ordered to file a brief within 60 days on the question of whether the appeal should be dismissed for lack of exhaustion. Petitioner was given the option of responding within 21 days of receipt of that brief. Appendix F. On October 16, 1992, the former briefing schedule set August 26, 1992, was cancelled deferring to the schedule set on October 1, 1992. Appendix G. On December 2, 1993 -- no brief by respondent's counsel having been filed as ordered on October 1, 1992 -- the Ninth Circuit issued an order to show cause directing that three questions be answered within 30 days of receipt of the order. The questions were:

> "(1) Each shall report on the status of any proceedings in respect to Richard Phillips convictions and sentence of death pending in the courts of the State of California.
>
> "(2) Why should not this appeal be dismissed without prejudice as premature in that all proceedings in the state court had not been exhausted as of the time the petition was filed?
>
> "(3) Why should not Richard Phillips make application in the state court for any

materials, computer investigations, etc. needed in aid of his appeals and habeas corpus review until a petition for habeas corpus is properly before this court?" Appendix H.

Petitioner filed an Appellee's Return to Order to Show Cause on December 27, 1993. Appendix O. Respondent filed a Petitioner's Response to Order to Show Cause. Appendix P. Counsel Horvath filed a Response to Order to Show Cause. Appendix Q. Oral argument was on October 11, 1994. Appendix I.[5/] Respondent filed a supplemental brief following argument, with a cover letter dated February 15, 1995. Appendix S. By letter dated April 4, 1995, respondent's counsel Horvath informed the court he was enclosing docket sheets from the trial court as to the trial, and from the California Court of Appeal, Fifth Appellate District, as to two habeas corpus petitions filed therein, in response to the court's request for further information. Appendix T.[6/] On May 26, 1995, the Ninth Circuit

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5. Prior to oral argument, petitioner by letter dated July 29, 1994, cited additional authorities for oral argument. Appendix R-1. Respondent, by letter dated August 28, 1994, addressed the additional authorities. Appendix R-2.

6. The trial court docket sheets -- on penalty retrial only -- are Appendix U. They are extremely cursory. The relevant items in Appendix U are all contained in N.L. -- Items 1-8 (CT), the more complete Clerk's Transcript. Before the Ninth Circuit had obtained the docket sheets from counsel Horvath, petitioner had, at that court's telephonic request, duplicated the entire clerk's transcript from respondent's penalty retrial for the court. Before the transcripts could be mailed, the court by telephone cancelled the request.

issued its opinion reversing the dismissal of the federal habeas corpus petition by the District Court and reinstating the petition. Appendix A. On June 8, 1995, petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc in the Ninth Circuit. Appendix V. On June 30, 1995, the Ninth Circuit directed respondent and his advisory counsel to respond to the petition for rehearing. Appendix J. Responses were filed by respondent (Appendix W) and his advisory counsel. Appendix X. On July 18, 1995, petitioner mailed a cover letter (Appendix Y-1) and Notice of Lodging (Appendix Y-2) along with copies of the Clerk's Transcript of respondent's penalty retrial, California Supreme Court docket sheets for respondent's two capital appeals, a request from the California Supreme Court for supplemental briefing in respondent's first capital appeal, respondent's request for correction of the record in his second capital appeal, petitioner's limited informal response, and petitioner's letter to the state trial court indicating completion of the review of respondent's request to correct the trial transcript.[7] Respondent's advisory counsel objected. Appendix Z. On July 24, 1995, petitioner faxed a Motion to Lodge those documents that accompanied the Notice of Lodging to the Ninth Circuit. Appendix Y-3. The motion was opposed by respondent (Appendix AA) and his advisory counsel. Appendix BB. On August 7, 1995, the motion to lodge documents was denied by the Ninth Circuit. Appendix K. On September 14, 1995, the Ninth Circuit denied petitioner's petition for rehearing and suggestion for rehearing en banc. Appendix L.

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7. Accompanying the instant petition is a Motion for Judicial Notice and to Lodge those same documents with this Court. See fn. 1, *supra*.

6. The Ninth Circuit's Published Reversal

In its published reversal of May 26, 1995, the Ninth Circuit ruled that requiring respondent to wait more than 15 years to have the federal courts consider his challenge to the guilt phase of his capital trial was too long. This finding of "extraordinary delay" was based on a simplistic analysis which considered only (1) that respondent had been convicted in 1980, (2) that the California Supreme Court reversed the death penalty and affirmed the guilt conviction in 1985, and (3) that respondent had not been resentenced to death until 1992, and finally, (4) that his automatic appeal from the penalty phase retrial was still pending before the California Supreme Court. This combination of facts, without any detailed analysis, was enough for the Ninth Circuit. The Ninth Circuit found that the guilt phase conviction was final in the California Supreme Court, and, according to respondent, was fully and completely exhausted. The Ninth Circuit ruled that after such a long passage of time, and with no foreseeable date for the resolution of the penalty phase retrial by the California Supreme Court, respondent could now challenge his guilt conviction in the federal courts while the automatic appeal of his penalty retrial was still pending before the California Supreme Court. Appendix A.

The Warden of San Quentin Prison and the Attorney General of the State of California petition for certiorari to correct the Ninth Circuit's unsupported and unwarranted finding of finality and extraordinary delay and the Ninth Circuit's order permitting respondent to challenge his guilt conviction on federal habeas corpus while the automatic appeal of the penalty phase retrial is still pending before the California Supreme Court.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the opinion of the Ninth Circuit establishes a dangerous precedent which will allow the District Courts across the country to intrude into pending state capital cases. Few would dispute the axiom that capital cases are more complex and take more time to resolve than ordinary criminal cases. It is equally beyond dispute that delay is the hallmark of the defense in these difficult cases. Under the ruling of the Ninth Circuit, in a capital case wherein the guilt phase is affirmed on appeal and the death penalty is reversed to later be retried, the mere passage of time will permit a capital defendant to bifurcate the case and challenge his guilt trial in the federal courts while the penalty trial is still pending final resolution in the state courts. There is simply no support whatever for a rule establishing fifteen years as a per se showing of presumptively prejudicial extraordinary delay. Rather than advancing the prompt resolution of these already difficult cases, the rule announced by the Ninth Circuit actually rewards a defendant for delaying the resolution of the penalty retrial.

This misconception of delay totally ignores the fact that criminal defendants in capital cases generally do all they can to stall their case and take as long as possible to prevent final resolution in the state courts, as did and does respondent herein. More importantly, to permit a simultaneous challenge to the guilt conviction in the federal courts while the penalty phase appeal is still pending in the state courts is a significant affront to the comity traditionally afforded state court proceedings. Permitting this unwarranted intrusion by the Federal Courts into the orderly state appellate procedures will

additionally create the likelihood of expensive piecemeal litigation and undermines the doctrine of abstention in deference to first obtaining finality of state court proceedings as espoused in *Judice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, S.L.Ed 376 (1977); *Huffman v. Pursue, Ltd.* 420 U.S. 592, 93 S.Ct. 1200, 43 L.Ed.2d 482 (1974) and *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 Ed.2d 669 (1971).

To add insult to injury, the purported finding of extraordinary delay is particularly egregious in this case since it was made by an appellate court which was acting without benefit of a full and accurate record. Once the full record is considered, there is simply no evidence to support the putative finding of extraordinary delay by the state.

In short, there is no factual, legal or public policy basis supporting the decision of the Ninth Circuit.

ARGUMENT

I.

PERMITTING A CAPITALLY CONVICTED DEFENDANT TO CHALLENGE HIS GUILT CONVICTION IN THE FEDERAL COURTS ON HABEAS CORPUS WHILE HIS PENALTY PHASE RETRIAL IS STILL PENDING ON APPEAL IN THE STATE COURT IS AN AFFRONT TO THE TRADITIONAL RULES OF COMITY AND ABSTENTION, ESPECIALLY SINCE THE FINDING OF PRESUMPTIVELY PREJUDICIAL EXTRAORDINARY DELAY IN THE STATE PROCEEDINGS IS DEVOID OF ANY FACTUAL SUPPORT

In what appeared to be a routine decision, the District Court dismissed respondent's habeas corpus petition without prejudice, declining to interfere with ongoing state capital murder proceedings on abstention grounds, citing to *Younger v. Harris*, 401 U.S. 37 (1971), *Huffman v. Pursue Ltd.*, 420 U.S. 592, 609 (1975) and *Judice v. Vail*, 430 U.S. 327, 348 (1977). Appendix B at 3. The District Court also found failure to exhaust since respondent's death sentence had not yet been imposed or reviewed by the state courts[8], citing to 28 U.S.C. § 2254 (b)-(c)[9] and *Rose v. Lundy*, 455 U.S. 509 (1982).

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8. As the District Court noted, respondent filed his *pro se* petition for writ of habeas corpus on March 4, 1992. Appendix B at 2. Respondent was not sentenced to death, following his penalty retrial, until March 13, 1992. Appendix B at 2; Appendix V at 13.

9. Section 2254(b)-(c) states:

Appendix B at 3-4. The District Court took this action sua sponte without requesting briefing or receiving any factual record from the Attorney General.

With a non-existent record the Ninth Circuit reversed the District Court, and found that under California law, the guilt phase of respondent's capital case was final, and that only the penalty phase appeal following penalty retrial was pending in the state courts. More remarkably, the Ninth Circuit found that the almost 15-year period since his conviction, with still more time yet to be taken in the resolution of his automatic appeal from his penalty phase retrial, was just too long and constituted extraordinary delay.[10/] Without any

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"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

10. The Ninth Circuit inflated the alleged delay by looking to the time from the date of the original death sentence (February 20, 1980) to calculate the 15-year delay. In actuality the first opportunity which respondent would have had to go to federal court to challenge his

real examination of the record in this case, two of the circuit judges amazingly characterized the delay as "extraordinary" and found that the delay rendered the state corrective processes "ineffective" within the meaning of section 2254(b), excusing exhaustion and rendering abstention under *Younger v. Harris* inapplicable. Appendix A at 5809-5814. The concurring circuit judge, while agreeing that section 2254(b) was applicable, also found *Younger v. Harris* to apply, but found the length of the delay constituted an unusual circumstance exception to the ordinary rules of comity and exhaustion. Appendix A at 5815-5817. The Ninth Circuit opinion further held that the delay was presumed to have been prejudicial to the opportunity for a fair retrial of the guilt phase. Appendix A at 5809-5810.

As noted in Argument II, *infra*, the Ninth Circuit's finding that the guilt phase was final under California law is wrong, as is the factual finding of presumptively prejudicial extraordinary delay. These findings were erroneous when considered as either rendering the state corrective process ineffective under section 2254(b) and rendering abstention under *Younger v. Harris* inapplicable, or when used to establish an unusual circumstance exception to *Younger v. Harris*.

In discussing *Younger v. Harris*, *supra*, 401 U.S. 37, and abstention, Judge Kleinfeld, in his concurring opinion, stated that *Younger* abstention applied until the

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guilt conviction would not have arisen until the California Supreme Court issued a remittitur upon completion of his first automatic appeal. The remittitur was issued in February of 1986. Thus, any delay in respondent's opportunity to seek federal court review of his guilt phase conviction is less than 10 years [1986 until 1995] rather than more than 15 years [1980 until 1995].

judgment was final in the state court and that final meant sentence was final. Finality of one issue was not enough. Appendix A at 5815-5816.[11]

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11. The majority's disagreement with Judge Kleinfeld's discussion on abstention and citation of *Brady v. Maryland*, 373 U.S. 83 (1963) that final judgment does not always mean sentence (Appendix A at 5806 continuing fn. 2), is misplaced. Brady was convicted of capital murder. After his conviction and sentence were affirmed on appeal by the Maryland Court of Appeals he learned that an extrajudicial statement of his separately tried codefendant admitting to the actual killing had been withheld from the defense at trial. On post conviction relief, the Maryland Court of Appeals found this to be prejudicial error and remanded the case for retrial on the issue of penalty, but not guilt. Brady petitioned this Court for certiorari. Therein, this Court stated,

> Neither party suggests that the decision below is not a "final judgment" within the meaning of 25 U.S.C. § 1257 (3), and no attack on the reviewability of the lower court's judgment could be successfully maintained. For the general rule that "Final judgment in a criminal case means sentence. The sentence is the judgment" (*Berman v. United States*, 302 U.S. 211, 212) cannot be applied here. If in fact the Fourteenth Amendment entitled petitioner to a new trial on the issue of guilt as well as punishment the ruling below has seriously prejudiced him. It is the right to a trial on the issue of guilt "that presents a serious and unsettled question" (*Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 547) that "is fundamental to the further conduct of the

As noted by Judge Kleinfeld,

> In *Younger*, the Supreme Court held that federal courts generally may not enjoin ongoing state criminal proceedings, but leaves room for possible exceptions to the general rule for "bad faith, harassment, or other unusual circumstance that would call for equitable relief." *Id.* at 54.

Appendix A at 5815.[12/] In a somewhat similar vein,

> case" (*United States v. General Motors Corp.*, 323 U.S. 373, 377). This question is "independent of, and unaffected by" (*Radio Station WOW v. Johnson*, 326 U.S. 120, 126) what may transpire in a trial at which petitioner can receive only a life imprisonment or death sentence. It cannot be mooted by such a proceeding. See *Largent v. Texas*, 318 U.S. 418, 421-422. CF. *Local No. 438 v. Curry*, 471 U.S. 542, 549.

Id. at 85 fn. 1

It is patent that under the unique procedural posture of that case, the general rule that final judgment meant sentence had to give way to Brady's due process rights as to the posture of his new trial. Respondent's case does not call for a similar disregard for the general rule that final judgment means sentence.

12. In *Younger v. Harris*, *supra*, 401 U.S. 37, this Court actually stated at page 54,

> Other unusual situations calling for federal intervention might also arise, but there is no point in our attempting now to specify what they might be. It is sufficient for purposes of the present case to hold, as we do, that the possible unconstitutionality of a statute "on its face" does not in itself justify an injunction against good-faith attempts to enforce it, and

in *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982) this Court noted

> that comity was the basis of the exhaustion doctrine: "it is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only 'in rare cases where exceptional circumstances of peculiar urgency are shown to exist.'"

Id. at 515-516, quoting from *Ex Parte Hawk*, 321 U.S. 114, 117 (1944).

According to the Ninth Circuit, in cases where exceptional or unusual circumstances are shown to be present, the doctrine of abstention under comity may be excused and federal courts may intervene in pending state proceedings prior to their state finality. As pointed out in Argument II, *infra*, there is simply no accurate record supporting a finding of unusual or exceptional circumstances in this case. To the contrary, it is regrettable but true that as most capital cases involving a penalty retrial go, the instant case is more typical than unusual. Admittedly, respondent's capital appeal is still

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> that appellee Harris has failed to make any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief. Because our holding rests on the absence of the factors necessary under equitable principles to justify federal intervention, we have no occasion to consider whether 28 U.S.C. § 2283, which prohibits an injunction against state court proceedings "except as expressly authorized by Act of Congress" would in and of itself be controlling under the circumstances of this case.

pending in the State Supreme Court and his death sentence is not yet final. This does not mean, however, he should be permitted to litigate a portion -- the guilt phase only -- of that case at the same time in the federal courts.

The Ninth Circuit has attempted to characterize the holding in this case as "limited" and "narrow." There is an implied suggestion that the holding in this case will not have any effect beyond this one case. Nothing could be farther from the truth. The situation presented in this case is neither unique to California nor unique within the other states with death penalty statutes. For a myriad of reasons, capital cases have become unnecessarily protracted and complex, especially when they reach the appellate courts. Allowing these cases to become further fragmented and splintered, with both the federal and state courts simultaneously reviewing different aspects of case, is an absurd way of solving the problem.[13/]

Any claim that there is precedent for this bifurcation of proceedings in the state and federal courts simultaneously by citing to *Burris v. Farley*, 51 F.3d 655 (7th Cir. 1995) (Appendix A at 5813-5814) is likewise misplaced. While it is true that Burris did challenge the guilt phase of his conviction in the federal courts while the penalty phase was still on state appeal following a new penalty trial, it is patent that this only occurred because for some undetermined reason, the State of Indiana did not object. In fact, at the hearing in the

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13. The specter of both court systems issuing discovery orders which inevitably will conflict with one another, the prospect of duplicative funding requests, and the issuance conflicting scheduling and briefing deadlines is hardly the model of efficiency.

District Court on the habeas corpus petition "the Attorney General [of Indiana] waived any arguments based on the exhaustion of state remedies," and the District Court accordingly declined to "consider the ramifications of this issue." *Burris v. Farley*, 845 F.Supp.636 (N.D. Ind. 1994). A reading of the entire opinion indicates that abstention under comity was never raised or discussed. *Id.* at 636-665. Thus, *Burris v. Farley*, *supra*, 51 F.3d 655 can hardly be deemed authority supporting a new and unique rule allowing bifurcation of a capital case in federal and state courts at the same time simply because the defendant has been able to delay finality for fifteen years. Such a peculiar precedent appears to reward delay rather than discouraging it.

This bifurcation of proceedings in both state and federal courts lends itself to further mischief: piecemeal litigation, e.g. *Rose v. Lundy*, *supra*, 455 U.S. at 520-521; *McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). It is indeed ironic that while Congress struggles with legislative efforts to streamline federal habeas, the Ninth Circuit is busy creating exceptions which will have the inevitable result of making the process more cumbersome and expensive. The established practice of using one federal habeas corpus petition to raise all federal challenges to both guilt and penalty remains far more preferable and efficient.

Lastly, petitioner would note this Court's opinion of *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct.617, 88 L.Ed.2d 598 (1986). In that case when it arose in the District Court, the State argued that Hillery had waited too long to challenge the racial make-up of the grand jury that had indicted him, claiming he should have filed his federal habeas corpus petition after his guilt conviction was affirmed, the penalty being reversed and

a new penalty trial ordered instead of waiting until the finality of the penalty phase. In rejecting the State's position, District Court Judge Karlton, stated,

> Although the California Supreme Court affirmed the guilt phase of petitioner's conviction in 1965, it reversed the death penalty imposed and remanded to the trial court for further proceedings. *People v. Hillery*, *supra*, at 713, 44 Cal.Rptr. 30, 401 P.2d 382. The appeal from the second penalty trial was not completed until 1967. *People v. Hillery* (1967) 65 Cal.2d 795, 56 Cal.Rptr. 280, 423 P.2d 208, *cert. denied*, 389 U.S. 986, 88 S.Ct. 486, 19 L.Ed.2d 496 (1968). In 1969, by writ, petitioner was successful in securing the reversal of the second penalty trial because of *Witherspoon* error. *In re Hillery* (1969) 71 Cal.2d 857, 79 Cal.Rptr. 733, 457 P.2d 565. At his third penalty trial, petitioner once again received the death penalty. In 1974, on automatic appeal to the California Supreme Court, the Court modified the penalty to life imprisonment. *People v. Hillery* (1974) 10 Cal.3d 897, 112 Cal.Rptr. 524, 519 P.2d 572. <u>This protracted litigation in effect precluded federal court intervention</u>. Had petitioner sought federal habeas relief while the state court litigation was continuing, considerations of comity and federalism would almost certainly have required dismissal. Both doctrines compel a respect for state functions and counsel against interference with ongoing state judicial proceedings. *Judice v. Vail* (1977) 430 U.S. 327, 335, 97 S.Ct. 1211, 1217, 51 L.Ed.2d 376; *Huffman v. Pursue, Ltd.* (1974) 420 US. 592, 601, 95 S.Ct. 1200, 1206, 43 L.Ed.2d 482; *Younger v. Harris* (1971) 401

> U.S. 37, 44, 91 S.Ct. 746, 750, 27 L.Ed.2d 669. Moreover, the California Supreme Court's determination on the guilt phase is unlikely to have induced a district court to hear petitioner's habeas since in this circuit, finality of one issue in the state courts is not generally sufficient to circumvent the requirements of comity and federalism. *Drury v. Cox* (9th Cir. 1972) 457 F.2d 764, 765. Thus, it appears that at the earliest petitioner could not have filed in federal court until 1967 following the California Supreme Court's affirmance of the death penalty imposed at the second penalty trial, and perhaps not even until 1974 when the state litigation was finally resolved.

Hillery v. Sumner, 496 F.Supp. 632, 637 (E.D. Cal. 1980). Emphasis added.

Having taken the position that review should have been sought earlier and having lost their argument in *Hillery v. Sumner*, it seems unfair that one should again lose when taking the opposite position, as was done in the instant case. "But justice, though due to the accused, is due the accuser also." *Snyder v. Massachusetts*, 291 U.S. 97, 122, 54 S.Ct. 330, 78 L.Ed. 674 (1934).

II.

THE THREE JUDGE PANEL IMPROPERLY REVERSED THE DISTRICT COURT'S DISMISSAL OF RESPONDENT'S HABEAS CORPUS PETITION ON GROUNDS OF ABSTENTION UNDER COMITY AND FAILURE TO EXHAUST BECAUSE OF RESPONDENT'S PENDING PENALTY APPEAL IN THE STATE COURTS WHEN IT FOUND THE GUILT PHASE HAD BEEN EXHAUSTED IN THE STATE COURTS AND THAT A DELAY OF FIFTEEN YEARS, WITHOUT MORE, JUSTIFIED FEDERAL INTERVENTION

The finding by the Ninth Circuit that the guilt phase was final in the state courts is wrong. As noted by the Ninth Circuit panel (Appendix A at 5804, fn. 1), while it is true that respondent's guilt conviction was affirmed on his original automatic appeal (*People v. Phillips*, *supra*, 41 Cal.3d at 84) and that the California Supreme Court does treat that as a final judgment for direct appeal purposes (*People v. Kemp*, 10 Cal.3d 611, 614; 517 P.2d 826; 111 Cal.Rptr. 562 (1974); *People v. Jackson*, 67 Cal.2d 96, 98; 429 P.2d 600; 60 Cal.Rptr. 248 (1967)), the court in *Kemp* also recognized that at the appeal from a penalty retrial, the defendant could challenge the guilt phase "under any applicable retroactive constitutional decision of the United States Supreme Court or of this court filed after affirmance of this judgment on the issue of guilt." *People v. Kemp*, *supra*, 10 Cal.3d at 613. Thus "final" does not mean the guilt phase is totally immune from further direct appellate attack, nor is it immune from collateral attack in the California Supreme Court. In the instant case, respondent's advisory counsel was appointed to represent respondent on the automatic appeal of his penalty retrial

in the California Supreme Court and was informed he could also challenge the guilt phase on state habeas corpus, but this was limited to guilt phase issues that had not been raised in prior pleadings. Appendix Q at 2-3. Thus, the California Supreme Court recognized that respondent, if he chooses, can still collaterally attack the guilt conviction in that court. While respondent may now allege that at present he has no intent to attack the guilt phase in the California Supreme Court, it is a good bet that he would not now chisel this waiver in granite to forever preclude him from either a collateral attack on habeas corpus or a direct attack within the pending appeal based on retroactivity which fortuitously presented itself in futuro. Thus, the Ninth Circuit erred in finding that under California law the guilt phase is final.

The Ninth Circuit's finding of substantial delay is also wrong, but has even more drastic consequences for the federal court workload. In discussing substantial delay, the court cited to *Coe v. Thurman*, 922 F.2d 582 (9th Cir. 1991). Appendix A at 5811, 5817. Therein, in discussing state appellate delay as a section 2254(b) exception to the requirement that an applicant exhaust his available state remedies, the *Coe* court quoted from *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972): "'We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate.' *Id.* at 521, 92 S.Ct. at 2187," and noted the applicability of the four factors delineated in *Barker* regarding speedy trial. The four are: (1) length of delay; (2) reason for delay; (3) defendant's assertion of his right; and (4) prejudice to the defendant. In addition, the three sub-factors *Barker* utilized to determine prejudice were altered for determining prejudice in appellate delay to: "(1) oppressive incarceration pending appeal; (2) anxiety and concern of the convicted party awaiting the outcome of the appeal;

and (3) impairment of the convicted person's grounds for appeal or of the viability of his defense in case of retrial." *Coe v. Thurman, supra*, 922 F.2d at 531-532.

In reaching its ruling in the instant case, the Ninth Circuit panel looked to only length of delay and presumed that respondent had been prejudiced in preparing for a possible guilt phase retrial. In doing so the Ninth Circuit ignored the other factors under *Barker v. Wingo* and *Coe v. Thurman*, despite the following language:

> As *Barker* reminds us, we regard none of the four factors . . . as either a necessary or sufficient condition to the finding of a deprivation of the right of a speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities: courts must still engage in a difficult and sensitive balancing process. *Id.* 407 U.S. at 533, 92 S.Ct. at 2193.

Coe v. Thurman, supra, 922 F.2d at 532.

Because of the unique procedural posture of this case (see fn. 1, *supra*) there was no real record before either the District Court or the Ninth Circuit. Nor did the Ninth Circuit ever attempt to secure a copy of the proceedings before the state courts. In fact, when given the opportunity to review these materials, the Ninth Circuit refused to consider them. Petitioner attempted to address the reasons for the delay in the petition for rehearing (Appendix V), but the panel denied petitioner's motion to lodge the relevant documents with that court (Appendix K, Y-1, Y-2, Y-3) and denied the petition for rehearing. Appendix L. Petitioner has filed a similar motion to lodge those documents with this Court. See fn. 1, *supra*.

It would seem to be a fundamental precept of justice that before a court makes a legal ruling which is dependent on a factual record, the court must be willing to assure itself that the facts upon which it is relying are accurate. This would seem to be especially true with respect to precedent setting decisions such as that involved in the instant case.

The time between respondent's arrest in Utah in March 1978 (*People v. Phillips*, *supra*, 41 Cal.3d at 42, 75) and his initial California conviction and sentence in February 1980 (Appendix V at 4, 16-17), cannot be characterized as an unjustified delay since it involved extradition in a capital case.

It would be a mischaracterization to call the time between the filing of the state appellate briefs on January and February 1981, and the California Supreme Court's opinion on December 31, 1985, as an unjustified delay. The California Supreme Court took extra pains with the capital case, even ordering supplemental briefing in areas of concern after oral argument which supplied the basis for the penalty reversal. Appendix V at 5-6, 16-17; *People v. Phillips*, *supra*, 41 Cal.3d at 65-75, 81-84.

The interval between the December 31, 1985, reversal of the penalty verdict and the penalty retrial in late 1991, (with a sentence of death being imposed on March 13, 1992) (Appendix M at 3-19; Appendix V at 6-14, 17), was the direct result of intentionally dilatory conduct by respondent. He waived retrial dates, requested postponements of his retrial date, filed numerous motions, changed counsel more than once, and filed numerous state habeas corpus petitions, all of which contributed to the time it took to complete his penalty retrial. Thus this 5-year period cannot be considered as an improper or unduly prolonged delay, since it was directly attributable to respondent's own volitional actions in delaying the retrial.

The period between respondent's March 13, 1992, penalty retrial sentencing and the present date during which his automatic appeal is pending before the California Supreme Court is based in great part on respondent's actions during the retrial. Acting as his own lawyer, respondent did something unique. He tape recorded his penalty retrial and then sought numerous extensions of time from the California Supreme Court to correct the trial transcript to conform the transcripts to the audio tapes. This process became a horrendous and complex task but a problem of respondent's own making. Once the California Attorney General's Office had been provided with a duplicate set of tapes by respondent, state personnel had go through the tedious process of checking on respondent's lengthy list of corrections to the penalty retrial transcript. Appendix V at 17-18. This delay between penalty sentencing on March 13, 1992, and the present can clearly be laid at respondent's doorstep.

It must also be pointed out that the three-year delay between the federal habeas corpus petition on March 4, 1992, and the ruling by the Ninth Circuit on May 26, 1995, reversing the District Court's dismissal of the petition is most certainly not attributable to the state.

Thus, when one looks to the actual record behind the 15-year period from when the Madera County Jury first found respondent guilty of murder, the vast majority of this time was eaten up by respondent in his attempts to avoid a penalty retrial. The initial period which was involved in his first capital appeal clearly inured to respondent's benefit, since it is conceivable that, absent the delay for the court requested supplemental briefing, respondent would not have had a penalty reversal. Thus, the reasons for the delay clearly legitimize the length of the time which the California Supreme Court spent considering this case. It is

perverse, ironic and inaccurate for the Ninth Circuit to conclude that this case involves unconscionable delay caused by state inaction.

Also, the presumption of prejudice to respondent in any retrial as found by the Ninth Circuit panel is clearly erroneous. As noted in the California Supreme Court's opinion, respondent testified at his initial trial and claimed alibi, impliedly putting the blame for the capital murder on his "friend," Richard Graybill. *People v. Phillips*, *supra*, 41 Cal.3d at 42-43. Graybill also had testified at that trial. *Id.* at 52 fn. 5. At the 1991 penalty phase retrial the People put on basically the same case as presented at the 1980 guilt trial. The People established the murder of Bruce Bartulis and the shooting, setting on fire and running over of Ronald Rose by respondent and the "hit list" respondent had mailed from the Utah jail giving specific directions how to kill (1) surviving victim Rose, (2) respondent's girlfriend, Sharon Colman, a witness to the murder, (3) Richard Graybill, the "friend" whom he blamed for the murder, and (4) respondent's own mother who could blow his alibi defense. Compare *People v. Phillips*, *supra*, 41 Cal.3d at 39-42, 62-63, 75-77, with N.L. -- Item 11 at 7-22. Graybill's testimony from the prior trial was read to the jury because Graybill had since become deceased. N.L. -- Item 11 at 7 fn. 5. Respondent, who claims he lied at his first trial (Appendix M at 3), put on a totally different penalty defense. Respondent did not testify and did not put on his alibi defense. He, instead attempted to put on a defense of a mutual shoot-out between respondent and Rose and Bartulis with Bartulis getting killed. Compare *People* v. *Phillips*, *supra*, 41 Cal.3d at 42-43 with N.L. -- Item 11 at 22-32. This apparently is the same defense he attempted to raise in the habeas corpus petition filed in the District Court that is at issue. Appendix M at 3, 12, 24, 33-37, 45. It thus would

appear that respondent has made good use of the delay between his original conviction in 1980 and his retrial in 1991 to scrupulously review the record and present an entirely different defense. There clearly was no prejudice to him by that delay between trials, and, likewise there should be no future prejudice to him if the federal court should demand a further retrial, except that he may be denied the "right" to manufacture a new defense.

Thus, the Ninth Circuit panel's ruling that the 15-year period which had elapsed since the guilt phase verdict and the presumed prejudice to respondent in dealing with any future guilt retrial is totally lacking in any foundational support, and, in fact, the real evidence, which was not even considered by the Ninth Circuit, is to the contrary,. Thus, the finding of extraordinary delay, either within the meaning of section 2254(b), rendering the state corrective process ineffective, or within the meaning of the unusual circumstances exception to abstention under *Younger v. Harris*, is flat out wrong and must be corrected by this Court's reversal of the Ninth Court opinion. The Ninth Circuit's clear error in finding that the state judicial proceedings necessary to hear and consider respondent's appeal from his penalty phase retrial amounted to unusual circumstances allowing the federal courts to review the guilt phase of respondent's capital trial must be reversed.

CONCLUSION

To permit a capital defendant to challenge the guilt phase of his trial in the federal courts while the appeal of his penalty retrial is still pending in the state courts violates all the rules of abstention under comity.

For all the reasons stated herein, Petitioners respectfully urge that this Court grant certiorari in this matter and resolve the important issues of law presented herein; or alternatively reverse and remand the judgment of the Ninth Circuit to enable the issue of delay to be first considered in the District Court with a full and complete proper record before it.

Dated: October 12, 1995.

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